

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE ROGER HUGUELET II,

Defendant-Appellant.

UNPUBLISHED

March 18, 2004

No. 242790

Ingham Circuit Court

LC No. 01-077789-FC

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration with person under thirteen years of age).¹ The trial court sentenced him to concurrent terms of 200 to 360 months' imprisonment for each count. Defendant appeals as of right. We affirm.

I

On appeal, defendant first advances several claims of ineffective assistance of counsel. Because defendant did not seek an evidentiary hearing on this issue below, we review the matter only for errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). To establish ineffective assistance of counsel, a defendant must show (1) that counsel made an error so serious that counsel did not perform as the counsel guaranteed by the Sixth Amendment, and (2) a reasonable probability that but for counsel's error the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first claims that trial counsel was ineffective for failing to object to the prosecution's notice of intent to use evidence of other uncharged incidents in which defendant allegedly sexually molested the complainant. This evidence principally consisted of the complainant's testimony that defendant began sexually molesting her years before the charged incidents. When the matter was discussed briefly between the trial court and defense counsel before jury selection, counsel indicated that he did not object because the complainant's

¹ Defendant was acquitted of one other charge of the same crime.

testimony about the alleged acts would “clearly” be admissible and because there was “some defense strategy to not placing an objection.”

Defendant has not established ineffective assistance of counsel based on trial counsel’s failure to object to this other acts evidence. There is a strong presumption that counsel’s conduct involved sound trial strategy. *Carbin, supra* at 600. Defendant has not overcome this presumption because it is not apparent that counsel lacked sound strategic reasons for deciding not to object to the testimony at issue. Counsel may have thought it preferable to allow the complainant to testify to alleged further acts of molestation because testimony about a larger number of alleged incidents might have increased the likelihood of inconsistencies or the potential for argument that aspects of the complainant’s accounts were implausible. Further, there is no reasonable probability that an objection to the evidence in question would have been successful. Testimony from the complainant that she was sexually abused by defendant for an extended period of time was admissible where she and defendant resided in the same household and, without such testimony, her testimony about the charged instances would have appeared incredible. Further, the complainant’s testimony in this regard was relevant to her difficulty in identifying the times of the various instances of charged abuse. See *People v Layher*, 238 Mich App 573, 585; 607 NW2d 91 (1999), *aff’d* 464 Mich 756; 631 NW2d 281 (2001) (evidence of other sexual acts between a defendant and the complainant may be admissible if they lived in the same household and, without such evidence, the complainant’s testimony would seem incredible). Also, there was little likelihood that the trial court would have excluded this testimony under MRE 403 on the ground that its probative value was substantially outweighed by its potential for unfair prejudice. The basic issue in this case was whether the complainant was being truthful in her testimony that defendant sexually abused her. The evidence at issue was highly probative with regard to the complainant’s credibility. See *Layher, supra* at 586 (evidence of prior uncharged offense by the defendant against the complainant was “directly relevant to the victim’s credibility”). Additionally, the potential for unfair prejudice was limited, given that this was not, for instance, a situation where evidence of a previously established incident of sexual abuse against a third party would make it more likely that a juror might vote to convict based on the defendant’s other wrongful conduct. Rather, it would have made little sense in the present case for a juror to substantially credit the complainant’s testimony about the prior acts unless the juror also substantially credited the complainant’s testimony about the charged acts. Accordingly, the other acts evidence in question would most naturally be used for the proper purpose of assessing the complainant’s credibility, not as a basis to convict defendant regardless of his actual guilt or innocence of the charged crimes. For these reasons, defendant has not established that counsel was ineffective for failing to object to the other acts evidence at issue.

Defendant also argues that trial counsel was ineffective by failing to object to instances of alleged prosecutorial misconduct. We disagree. First, defendant faults trial counsel for failing to object to the prosecutor asking the complainant leading questions during her trial testimony. However, defendant has not overcome the presumption of sound trial strategy. *Carbin, supra* at 600. Trial counsel attacked the complainant’s credibility during his closing argument in substantial part by indicating that her testimony in answer to leading questions reflected a lack of memory about actual occurrences. Trial counsel may reasonably have decided to refrain from objecting to leading questions based on a belief that successfully objecting in this regard would have removed a substantial basis for attacking the complainant’s credibility and out of concern

that doing so might have led to answers to non-leading questions that would have appeared more credible.

Defendant also criticizes trial counsel for failing to object to allegedly improper argument by the prosecutor during jury voir dire. However, there is no basis for concluding that different conduct by trial counsel would have changed the outcome of the trial. *Carbin, supra* at 600. The trial court interjected to disapprove of the prosecutor's remarks as "making an opening statement." We do not see how an objection by trial counsel would have provided any more meaningful benefit to defendant. Further, there is no reasonable probability that the remarks affected the outcome of the trial because they simply amounted to an indication of the charges against defendant, which the jury was ultimately informed of at trial.

Finally, defendant attacks trial counsel's failure to object to references by the prosecutor in opening statement and closing argument that the complainant allegedly suffered sexual abuse over the course of three years. However, the prosecutor's remarks in his opening statement to the effect that the complainant would indicate in her testimony that defendant had been sexually molesting her since she was six years old were proper as part of the prosecutor's summary of the evidence he intended to present at trial. See MCR 6.414(B) (absent agreement otherwise, prosecutor must give an opening statement that provides a full and fair statement of facts the prosecutor intends to prove). Also, as further addressed below, the prosecutor's references in closing argument to this history of sexual abuse by defendant were proper. Thus, trial counsel was not ineffective by failing to object. See *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002) (counsel does not provide ineffective assistance by failing to make futile objections).

II

Defendant next argues that there was insufficient evidence to support his conviction of count I, which was based on a charge that he sexually penetrated the complainant's genital area with his penis on June 15, 2001. We disagree. In assessing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether it would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *Milstead, supra* at 403 n 7.

CSC I consists in relevant part of "sexual penetration" with another person who is under thirteen years of age. MCL 750.520b(1)(a). Sexual penetration is defined for purposes of the CSC I statute as including any intrusion "however slight" of any part of a person's body into the genital opening of another person's body. MCL 750.520a(o).²

Defendant asserts that the complainant never testified that he penetrated her with his penis. However, a reasonable juror could have concluded beyond a reasonable doubt that the complainant was referring to defendant's penis when she described his "private" as being located

² This citation reflects the current codification of this statutory definition. Although codified in different subsections of MCL 750.520a at times pertinent to this case, the statutory language was in effect at all relevant times.

between his legs and having been put in her “private part.” Further, from the complainant’s testimony that it hurt when defendant tried to put his “private” into her, the jury could have determined beyond a reasonable doubt that defendant inserted his penis at least partly into her genital area. Thus, the complainant’s testimony was sufficient to support the conviction at issue.³

III

Next, defendant argues that he was denied a fair trial by the prosecutor’s remarks during closing argument. We disagree. Because defendant did not object to any of the remarks at issue, appellate review is limited to whether there was plain error that affected defendant’s substantial rights. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003).

Defendant first claims that the prosecutor improperly “continually attacked defense counsel for cross-examination of [the complainant], as though the cross-examination was fundamentally improper.” From our review of the prosecutor’s closing argument, this is inaccurate. The prosecutor did not make any remarks that could reasonably be viewed as improperly attacking defense counsel for cross-examining the complainant, let alone suggesting that it was fundamentally improper for him to cross-examine her. Rather, as part of an argument in support of the complainant’s credibility, the prosecutor essentially indicted that she did not gain anything tangible from her allegations of sexual abuse by defendant, but rather suffered some unpleasant experiences, including being cross-examined at trial. This was proper argument in support of the complainant’s credibility. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997) (a prosecutor may argue from the facts that a witness is credible).

Defendant also vaguely asserts that the prosecutor “relied on multiple statements alleging long-term sexual assaults against [the complainant]” that were meant “to inflame the jury” and cause it to suspend its judgment and to convict defendant on that basis. In the closing remarks that defendant appears to challenge, the prosecutor referred several times to the complainant’s testimony that she was sexually abused by defendant over a three-year period. Considered in context, the prosecutor was emphasizing the long-term nature of the sexual abuse alleged by the complainant as part of an argument that it was understandable that she had difficulty remembering some details, and further, that, given her young age, this was actually more consistent with her credibility than if she were able to testify in specific detail to events that occurred over a three-year period. Again, this was permissible argument from the evidence in support of the complainant’s credibility. *Howard*, *supra* at 548. Further, the prosecutor’s repeated references to the three-year period of alleged sexual abuse were not improper, given

³ To the extent that defendant suggests that Dr. Guertin’s testimony demonstrates insufficient evidence of sexual penetration, we disagree. Having reviewed Dr. Guertin’s testimony, we conclude that the jury could have accepted his testimony and still have credited the complainant’s testimony indicating that defendant vaginally penetrated her with his penis. Further, the jury was not required to accept the Dr. Guertin’s testimony regarding this matter. See *Milstead*, *supra* at 404 (witness credibility is issue for the jury to decide and will not be resolved anew on appeal).

that a prosecutor need not state his argument in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

IV

Finally, defendant argues that the cumulative effect of errors in this case denied him a fair trial. It is possible for the cumulative effect of minor errors to warrant reversal in some circumstances in which the errors considered individually would not do so. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). However, in light of our conclusions that defendant has not shown that trial counsel was ineffective, and that the prosecutor's remarks were not improper, there is no basis for relief based on cumulative error in this case.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot